# Lah Kah Giap v Loh Ah Hong (sued as the executor and trustee of the estate of Lay Lee Siang, deceased)

HIGH COURT (PENANG) — CIVIL SUIT NO 22-300 OF 1998
ZALEHA ZAHARI J
18 NOVEMBER 1999

***Civil Procedure*** *— Pleadings — Striking out statement of claim — Whether triable issues raised*

The deceased had entered into an agreement with plaintiff to give the plaintiff the right to run a restaurant for six years and in that period to pay her RM1,000 per month. Thereafter, the running of the business was to be handed over to another named person. Four years later, the deceased executed a will bequeathing the business and goodwill of the restaurant to her trustee who was to have sole discretion in the running of restaurant. The deceased died and a grant of probate of the deceased's estate was executed. The plaintiff filed this action seeking declarative orders with regard to the proper intention of the will as the plaintiff challenged the validity of the bequest under the will. The plaintiff's contention was that the effect of the agreement was a total divestment by the deceased of all of her interest in the business of the restaurant in favour of the plaintiff and as such the bequest was null, void and of no legal effect as the principle of ademption applied. The defendant applied for the plaintiff's writ of summons and statement of claim to be struck off pursuant to O 18 r 19 of the Rules of the High Court 1980 ('RHC') and the application was allowed by the senior assistant registrar ('SAR'). The plaintiff appealed.

**Held,** dismissing the appeal:

The plaintiff had not raised any issue to be tried as it was clear beyond reasonable doubt that the deceased had not manifested any intention to divest herself of her interest in the restaurant when the agreement was signed. The effect of the provisions of the agreement was that what the deceased gave the plaintiff was the right to run the restaurant for the fixed term of six years and no more. The deceased did not intend to give up the said restaurant unconditionally to the plaintiff. In the circumstances the SAR was right in her decision (see pp 743B, E–F, H, 744C).

**[Bahasa Malaysia summary**

Si mati telah memasuki satu perjanjian dengan plaintif untuk memberikan plaintif hak menjalankan satu restoran untuk enam tahun dan dalam tempoh tersebut membayar kepada beliau RM1,000 sebulan. Selepas itu, pengurusan perniagaan tersebut akan diserahkan kepada penama lain. Empat tahun kemudian, si mati telah menyempurnakan satu wasiat yang mewasiatkan perniagaan dan

A nama baik restoran tersebut kepada pemegang amanah beliau yang merupakan pemeganag amanah tunggal beliau dalam menguruskan restoran tersebut. Si mati telah meninggal dunia dan satu geran probat harta pusaka si mati telah disempurnakan. Plaintif telah memfailkan tindakan ini memohon perintah-perintah deklarasi berhubung niat sebenar wasiat tersebut kerana plaintif telah mencabar kesahihan
B pewarisan wasiat tersebut. Penegasan plaintif adalah tentang kesan perjanjian tersebut yang merupakan satu pelucutan langsung oleh si mati terhadap semua kepentingan beliau dalam perniagaan restoran tersebut yang menyebelahi plaintif dan oleh demikian wasiat tersebut adalah terbatal, tidak dah dan tiada kesan undang-undang kerana
C prinsip adempsi terpakai. Defendan memohon agar writ saman plaintif dibatalkan menurut A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan permohonan tersebut telah dibenarkan oleh penolong kanan pendaftar ('PKP'). Plaintif telah membuat rayuan.

D **Diputuskan,**me nolak rayuan tersebut:

Plaintif tidak menimbulkan apa-apa persoalan untuk dibicarakan kerana ia adalah jelas melampaui keraguan munasabaha bahawa si mati tidak menunjukkan apa-apa niat untuk melucutkan diri beliau daripada kepentingan beliau di dalam restoran tersebut semasa
E perjanjian tersebut ditandatangani. Kesan daripada peruntukan-peruntukan perjanjian tersebut adalah apa yang diberikan oleh si mati kepada plaintif adalah betul untuk menguruskan restoran tersebut untuk tempoh yang ditetapkan selama enam tahun dan tiada lebih daripada itu. Si mati tidak berniat untuk melepaskan restoran tersebut tanpa syarat kepada plaintif. Dalam keadaan ini PKP adalah betul
F dalam keputusan beliau (lihat ms 743B, E–F, H, 744C).]

**Notes**

For cases on striking out of pleadings, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3681–3684.

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**Legislation referred to**

Rules of the High Court 1980 O 18 r 19(1)(b), (c), (d)

*Tan Beng Hong* (*Carolyn Ooi* with him) (*Toh Theam Hock & Co*) for the
H plaintiff/appellant.

*John Khoo* (*Ismail Khoo & Associates*) for the defendant/respondent.

**Zaleha Zahari J**: This is a suit between two brothers in respect of their mother Lay Lee Siang's ('the deceased'), estate. She died on 21 April 1988 leaving a will, exh 'L-1', encl 4 ('the said will') in which she named Loh Ah
I Hong ('the defendant') as the executor of her estate.

The principal issue for determination in this case is whether the bequest made vide cl 10 of the said will is valid. The plaintiff contends this bequest

to be invalid. The defendant contended otherwise. It is common ground that the terms of an agreement executed by the deceased during her lifetime ie on 1 June 1993, exh 'L-3', encl (5) (hereinafter referred to as 'the said agreement') on the one part, and the plaintiff, on the other part, is the document that needs to be critically examined in the consideration of this case.

On 23 September 1999, I dismissed the plaintiff's appeal [encl (29)] against the senior assistant registrar's ('the SAR') decision dated 29 December 1998 in allowing the defendant's application dated 25 August 1998 [encl (9)] for an order that the plaintiff's writ of summons and statement of claim be struck off with costs pursuant to O 18 r 19(1)(b), (c) and/or (d) of the Rules of the High Court 1980. My reasons are follows.

The background facts as disclosed by the affidavit evidence filed in support of, and in opposition to, the application are as follows.

Firstly, it is necessary to set out the material clauses in the said agreement and cl 10 of the said will in full. They read as follows:

*(a) The agreement*

WHEREAS

1 Lee Lay Siang is the proprietor of the restaurant known as Sea Pearl Restaurant bearing the address No 338, Mk 18, Tanjung Tokong, 10470 Penang ('the said premises') and carries on a sea food restaurant business ('the said business');

2 Lee Lay Siang is desirous of retiring from running the said business and now wishes to hand over the running of the said business to her second son, Loh Kah Giap;

3 Loh Kah Giap has agreed to run the said business for a specific period of time.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1 In consideration of Lee Lay Siang having agreed to allow Loh Kah Giap to run the business known as Sea Pearl Restaurant bearing the address No 338, Mk 18, Tanjung Tokong, 10470 Penang for a period of six years only from the date of this agreement, ie from 1 June 1993 to 31 May 1999, Loh Kah Giap hereby covenants with Lee Lay Siang to pay to Lee Lay Siang a monthly allowance of Ringgit Malaysia One Thousand (RM1,000) only, such allowance to be paid to Lee Lay Siang by the third (3rd) of every month.

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8 Should Lay Siang pass away within the duration specified in this agreement, her monthly allowance of RM1,000 is to be given to Loh Kah Hin (NRIC No 3465230) of No 80 W Mt Erskine Road, 10470 Penang.

A 9 Upon the expiry of the period specified in this agreement, the running of the said business shall be handed over to Loh Kah Hin and if Loh Kah Hin is unwilling and/or unable and/or not desirous of running the said business, the option of running the said business shall be given to his son, Loh Chye Keat (NRIC No 1808443) of No 80 W Mt Erskine Road, 10470 Penang. If Loh Chye Keat is unwilling and/or unable and/or not
B desirous of running the said business, the running of the said business shall be handed to whomsoever Loh Kah Hin shall decide.

10 The person decided by Loh Kah Hin to run the said business shall give to Loh Kah Hin and Loh Kah Giap a monthly allowance of Ringgit Malaysia Five Hundred (RM500) only each.

11 Upon the expiry of the time period specified in this agreement, Loh Kah
C Giap is to hand over the said business and the said premises to Loh Kah Hin or Loh Chye Keat together with all the items as stated in Sch A.

*(b) The will*

D It is not in issue that four years later (whilst the said agreement was still subsisting), the deceased executed the said will of which para 10 reads as follows:

> I devise and bequeath the business and goodwill of the restaurant trading under the name of Lee Lay Siang at No 338, Mukim 18, Tanjong Tokong, 10470 Penang to my trustee who shall have the sole discretion in the running
E of the business or otherwise.

Ten months after execution of the said will, ie on 21 April 1998, Lee Lay Siang died.

F The plaintiff/appellant's submissions

Encik Tan Beng Hong, counsel for the plaintiff, submitted that the effect of the said agreement is a total divestment by the deceased of all of her interest in the said restaurant business in favour of the plaintiff. That by reason of such divestment, the deceased no longer had an interest in the said restaurant, and that the bequest as contained in cl 10 of the said will was,
G according to him, null and void and of no legal effect as the principle of ademption applies.

The plaintiff in this case is seeking several declaratory orders as to the proper interpretation that should be given to the said will, namely, whether the deceased had gifted away the restaurant business to the plaintiff during
H her lifetime. He submitted that this issue can only be determined at the trial of the action. In his view, this is not a case which is clearly and plainly unsustainable and the SAR erred in making the order that she did. He therefore urged this court to allow the appeal.

I The respondent's submissions

Encik Khoo in his reply submitted that the plaintiff was bound by his pleadings. According to him, in para three of the statement of claim, the

plaintiff had admitted to being conferred with a licence/tenancy of six years only and no more. A

He further submitted that the terms of exh 'LAH-2' are extremely clear and open to one interpretation only; that it only confers upon the plaintiff the right to run the said restaurant for a fixed term of six years from 1 June 1993 to 31 May 1999 and nothing more. According to him, in no way can the said agreement be read as a total divestment by the deceased of her interest in the said restaurant as alleged by the plaintiff. B

He informed the court that the grant of probate of the deceased's estate had already been extracted. That although the plaintiff had initially challenged the application for probate vide Penang High Court No 22-776-98, the plaintiff had subsequently withdrawn the challenge. C

In these circumstances, it was Mr Khoo's submission that this case was clearly unsustainable and accordingly prayed that the plaintiff's appeal be dismissed with costs.

Findings D

After careful consideration of the terms of the said agreement, the terms of the said will, the affidavit evidence and the submissions of counsel, I am in agreement with the submission of counsel for the defendant that the claim of the plaintiff in this case is clearly and obviously unsustainable. I am of the view that the plaintiff has not raised any issue to be tried. E

Giving the words used in the said agreement and the said will their ordinary and natural meaning, I am of the view it cannot bear the meaning as construed by the plaintiff. To me it is clear beyond doubt that the deceased had not manifested any intention to divest herself of her interest in the said restaurant in 1993. I further hold that the principle of ademption does not apply to the facts of this case. F

Firstly, this court took note of preambles two and three of the said agreement which declare the deceased of being desirous of retiring from running the said restaurant in favour of the plaintiff and that the plaintiff 'has agreed to run the said business for a specific period of time', which is subsequently defined by cl 1 to mean a 'for a period of six years only from the date of this agreement, ie from 1 June 1993 to 31 May 1999'. G

Further, by providing expressly in cl 9 of the said agreement that, upon expiration of the said agreement, the plaintiff was to hand over the running of the restaurant and premises to one 'Loh Kah Hin' or 'Loh Chye Keat' or 'whomsoever Loh Kah Hin shall decide', the deceased had in clear terms disclosed that she did not intend to give up the said restaurant unconditionally to the plaintiff contrary to what is being alleged by him. H

That there was no total divestment by the deceased of her interest in the said restaurant is fortified by cl 8 of the said agreement when she deemed it fit and necessary to make express provisions as to what was to happen to the RM1,000 which the plaintiff was to pay to her every month during the duration of the Agreement, and by making it mandatory for the plaintiff to I

A continue to make the said payment RM1,000 that was payable to her to 'Loh Kah Hin' in the said agreement.

The penultimate cl 11 of the said agreement nails the point when it expressly provides that the plaintiff, upon expiration of the said agreement, was to hand over the said business and premises to 'Loh Kah Hin' or 'Loh Chye Keat'.

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Thus, when effect is given to all of these provisions read as a whole, I am of the view that it points to one and only one conclusion, ie that all that the deceased gave to the plaintiff was the right to run the restaurant for the fixed term given of six years and no more.

C In these circumstances, I hold that the SAR was right in making the decision that she did. The plaintiff's appeal was accordingly dismissed with costs and the decision of the SAR dated 12 September 1998 is upheld.

*Appeal dismissed.*

D Reported by Andrew Christopher Simon

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